No. 13265

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LARRY'S SANDWICHES, INC., a California corporation,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY CO., a California corporation,

Appellee.

OPENING BRIEF OF APPELLANT.

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Appellant,

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PACIFIC ELECTRIC RAILWAY CO., a California corporation,

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OPENING BRIEF OF APPELLANT.

Statement as to Jurisdiction.

The action is brought by Appellant (a shipper) for damages to a shipment of frozen sandwiches received at Culver City, California, by Appellee (a common carrier by railroad) for transportation in interstate commerce to Chicago, Illinois. The matter in controversy exceeds $10,000.00 exclusive of interest and costs [R. A. 2-6].[1] The action arises under the Interstate Commerce Act, laws of the United States §20(11), 49 U. S. C. A. §20(11). The United States District Court for the Southern District of California had jurisdiction of the action by reason of the provisions of 28 U. S. C. A. §1331.

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[1]"R. A." followed by numerals indicates reference to the page of Volume I of the record on appeal which contains pleadings and other documents. "Tr." followed by numerals indicates page of the reporter's transcript of the trial. "Ex." followed by numerals or letters indicates a reference to an exhibit received in evidence in the case and made a part of the record on appeal.

The case is brought before the United States Court of Appeals for the Ninth Circuit on appeal from a judgment in favor of the defendant carrier in the District Court [R. A. 41-45, 109-110]. The jurisdiction and venue of the United States Court of Appeals for the Ninth Circuit arises by virtue of the provisions of 28 U. S. C. A. §§41,1291 and 1294.

Statement of the Case.

1. Statement of the Manner in Which the Questions Arise.

During July, 1960 and for some years prior thereto appellant was engaged in the manufacture of food products, mostly sandwiches at Culver City, California [Tr. 5-6]. Frozen sandwiches had been manufactured since 1956 [Tr. 8]. Between 1956 and early 1960 distribution of these frozen sandwiches was made throughout various parts of the United States primarily by truck [Tr. 8]. To secure lower transportation costs Appellant began shipping frozen sandwiches by railroad in mechanically refrigerated cars in the early part of 1960 [Tr. 9, 90]. Some 10 or 11 such rail shipments had been made without damage or other incident to the time the shipment here involved moved [Tr. 9, 90].

The shipment which is the subject of this action consisted of a carload some 2316 cases described in the bill of lading as "Frozen Sandwiches" [Exs. 4, 7]. The transportation was performed in an insulated car equipped with a mechanical refrigeration unit [Tr. 379-390, Exs. M, O]. The car contained no other lading. The shipment moved from Culver City at approximately 5:00 P.M. on July 21, 1960 and was tendered to the consignee at Chicago, Illinois on July 27, 1960, at

about 1:00 P.M. after transportation over the lines of Appellee and its connecting carriers over a route via Colton, California, El Paso, Texas, Tucumcari, New Mexico, Kansas City, Kansas, and Silvis and Burr Oak, Illinois (rail stations in the Moline and Chicago, Illinois, areas respectively) [Ex. A, Ex. I].

The shipment was rejected upon its arrival at destination because part of the load was unfrozen and otherwise damaged [Tr. 151-157, Ex. 8]. Although the bill of lading did not specifically indicate the type of protective service required, it was stipulated that Appellee had actual notice that mechanical refrigeration was ordered and that appellee had undertaken to provide such service. The shipment was thereafter returned in the same car to Culver City. At that time the entire shipment was frozen but unmerchantable [Tr. 47-55].

Appellant, after filing a claim in a proper form which was rejected, filed this action for the loss of the shipment. Appellee's answer raised the issue of the condition of the shipment at the time of tender and asserted that the injury was caused by reason of the "perishable" nature of the goods. Appellee alleged that due care had been used in handling and that shipper's instructions had been followed.

Appellant in its case in chief, offered evidence, *inter alia,* to establish that the shipment was frozen and otherwise in good condition when tendered to the Appellee at Culver City. This evidence, in basic outline, consisted of (a) testimony of employees of the Appellant as to practices and procedures followed in the manufacture and freezing of sandwiches, (b) expert

testimony that such practices were in accordance with good standards in the industry, (c) evidence as to the Appellant's practices followed in the handling and loading of frozen food shipments, including the shipment in question, on rail cars, (d) expert testimony that such practices were in accordance with good standards in the industry, and (e) testimony of certain of those who had participated in the loading of the car that the cases comprising the shipment were cold when placed in the car.

In its case in chief Appellant also proved that portions of the shipment were unfrozen and otherwise in bad order when tendered to the consignee at Chicago. These facts were established primarily through the testimony of a representative of the consignee and records made at the time the contents were examined upon arrival. There was also testimony of Appellant's employees that the sandwiches were found to be mouldy, deteriorated and unmarketable upon examination after their return frozen from Chicago. The parties stipulated, among other things, that the tariffs of Appellee and its connecting carriers required such carrier to provide mechanical protective service adequate to maintain said shipment in a frozen condition.

The evidence of the Appellee dealt primarily with the character and condition of the car used to perform the transportation and the records which were kept by carrier representatives while the car was in transit. The evidence bearing upon the character and condition of the car consisted, in substance, of (a) expert testimony and exhibits to establish the design characteristics and capacities of the car and its mechanical unit, (b) the results of certain tests of the

car's refrigeration equipment made after its return to Culver City, (c) evidence of a car mechanic as to his observations of the performance of the car while in Chicago both before and after the time of tender of the shipment to the consignee and as to the nature and character of certain work performed by him in repairing a broken return fuel line. Except as to the testimony of the last mentioned witness the Appellee's evidence as to the car's performance while in transit was restricted to records made by carrier employees at various stations while the car was in transit and dealing generally with the times of arrival and departure, air temperature, fuel in tanks, the record of the readings of a thermometer so located as to indicate the temperature in an air chamber inside the car at a point a few inches below the freezing coils of the refrigeration unit, and whether or not the compressor unit was operating at the time inspection was made.

Defendant also presented as a part of its case the testimony of one of the inspectors for the delivering carrier who had inspected the shipment at Chicago the day following its tender to the consignee and an employee of the Appellee who made inspection of the car after its return to Culver City. In general the testimony of these witnesses corroborated the testimony of Appellant's witnesses as to the temperatures of product at these two points. The testimony of Appellee's inspector at Chicago was, however, at variance in some respects with the testimony of other witnesses. Except for this variance, there was very little conflict in the evidence of the parties as to specific facts.

Appellee's expert witness expressed the opinion that a partially unfrozen load might produce the car tem-

peratures recorded en route but conceded that such temperatures, while they were in all instances below freezing, were not at the level to be expected with a frozen shipment and a properly operating car. This witness also indicated that he considered some of the practices followed by Appellant in loading to be less satisfactory than those he had observed at other locations but expressed no opinion that the practices followed would have any material adverse effect on product temperatures.

On rebuttal Appellant produced expert testimony of a refrigeration engineer who testified Appellant's loading practices questioned by Appellee's expert could have had no measurable effect on product temperatures. This witness also gave testimony that failure of air circulation within the car while it was in transit to Chicago was the only cause of the damage sustained which was consistent with all of the known physical facts.

The expert witnesses for both Appellant and the Appellee were in agreement (a) that the car used for the transportation of the shipment involved had adequate refrigerating capacity when in proper operation to hold frozen sandwiches in frozen condition indefinitely, (b) that the mechanical refrigeration unit had sufficient cooling capacity to lower the temperature of contents of the car in the event the temperature of such contents was above the temperature setting of the car, (c) that frozen sandwiches have no interior heat or heat generating capacity to cause deterioration, and (d) that the introduction of heat into the cargo storage compartment of the car from an outside source would be the only way in which the temperature of a ship-

ment placed in the car in frozen condition could be raised.

The District Court gave judgment for the Appellee (defendant below) upon the legal premise that the Appellant had the duty to show, not only that the cargo was delivered to the carrier in good condition, but also to show some specific negligent conduct on the part of the Appellee, or its connecting carriers, which precluded delivery in good condition at the end of the journey. The District Court made no finding of fact as to whether or not the shipment was frozen and otherwise in good condition at the time of delivery to the carrier. Also, no finding of fact was made as to whether or not injury to the goods while in the carrier's possession was caused by an act of God, the public enemy, public authority, act of the shipper, or an inherent vice or defect in the goods itself. Appellant's motion to include findings of fact on these matters was denied by the District Court. Also denied were motions for new trial and for alteration of judgment under Rule 59(a) and (e) of the Rules of Civil Procedure based upon the failure of the District Court to follow the applicable law.

2. The Questions Involved.

Four basic questions are presented. If any one is resolved in favor of the Appellant the judgment of the District Court must be reversed. These questions are:

2.1 Did the District Court apply to the facts before it an incorrect interpretation of the applicable law pertaining to the duty of a common carrier to a shipper for damage to shipper's goods while in the carrier's possession?

2.2 Did the District Court apply an incorrect interpretation of the applicable law as to the burden of proof imposed upon Appellant as a shipper and the Appellee as a carrier respectively in this action for damage to Appellant's goods while in the possession of the Appellee or its connecting common carriers?

2.3 Did the District Court fail to making findings of fact sufficient to support its judgment and to provide the Court of Appeals with a clear understanding of the basis of the District Court's decision?

2.4 Are the Findings of Fact which have been made by the District Court so clearly against the weight of all of the evidence that it is apparent a mistake has been made?

Specification of Errors.

The judgment of the District Court in favor of the Appellee should be reversed because the District Court has committed the following errors:

1. The District Court has predicated its Finding of Fact, Conclusions of Law and Judgment upon erroneous interpretations of law in that the District Court failed to apply to its determination of the case the established rules of law pertaining to the duty of a carrier to a shipper for loss or damage of goods while in possession of the carrier.

2. In its Findings of Fact, and particularly in Finding of Fact X to the effect that:

> "Plaintiff failed to sustain the burden of proving that either the defendant or its connecting carrier, were in any way negligent in the transportation of said shipment"

the District Court failed to apply established rules of law as to the burden of proof in an action by a shipper against a common carrier for damage to goods while in the possession of such carrier.

3. The Findings of Fact of the District Court are not sufficiently definite to provide the Court of Appeals with a clear understanding of the basis of decision of the District Court and are, therefore, inadequate to support a judgment, in that the District Court failed to find:

3.1 Whether or not the goods of Appellant were frozen and otherwise in good order at the time of its tender to the Appellee.

3.2 Whether or not the goods of Appellant were damaged while in the possession of Appellee by reason of an Act of God, the public enemy, public authority, the fault of the shipper, or an inherent vice or defect in the goods.

4. In arriving at its findings that "Said sandwiches were in fact of a perishable nature" the District Court failed to consider and follow uncontradicted evidence in that:

4.1 The evidence of both parties established that frozen sandwiches have no interior source of heat or other cause of self destruction or damage.

4.2 The evidence of both parties established that sandwiches when frozen can be preserved in good condition for many months when stored under proper conditions of refrigeration.

4.3 The evidence of both parties established that frozen sandwiches in a refrigerated car of the design

and capacity provided by the Appellee would not deteriorate in the time in transit involved in this action unless heat were introduced into the cargo compartment from some outside source.

5. The following specified Findings of Fact of the District Court are so clearly against the weight of all of the evidence that it is apparent they do not reflect the truth and right of the case and that a mistake has been made:

5.1 The finding in Paragraph VII that:

"Defendant and its connecting carriers have fully complied with all of the provisions of the bill of lading and of all applicable protective tarriff rules and regulations in the transportation of said shipment."

5.2 The finding in Paragraph VIII that:

"Defendant and its connecting carriers exercised care and afforded to said shipment in the transportation thereof, adequate and reasonable refrigerated protective service of the kind and extent requested by plaintiff."

5.3 The finding in Paragraph IX that:

"Nothing done or omitted to be done by the defendant, or any of its connecting carriers, proximately caused any loss or damage to said shipment."

ARGUMENT.

1. The Judgment of the District Court Is Clearly Erroneous Because It Is Predicated Upon an Incorrect Interpretation by the District Court of the Law Applicable as to the Duty of a Common Carrier to a Shipper for Damage to the Shipper's Goods While in the Possession of the Carrier.

Summary of the Argument.

The District Court predicated its decision upon the premise that in an action by a shipper against a common carrier for damage to goods in transit the shipper has a duty to establish some specific act of negligence on the part of the carrier as a condition precedent to recovery and that on the facts here shown the true cause of the damage remained unexplained. This concept of the law was erroneous because, both under the common law and by statute, the Appellee, as a common carrier, is liable without proof of negligence unless the Appellee can show the actual cause of the in transit damage and that such cause was an Act of God, the public enemy, public authority, act of the shipper, or the inherent vice or nature of the commodity. The evidence fails to establish any of these specific circumstances was in fact the cause of the loss. Such being the case Appellee was liable as an insurer for the damage in transit even though the actual cause of the loss was unexplained. Thus, on the fact assumption made by the District Court that the cause of loss was unknown, Appellant was entitled to a judgment.

1.1 There Are Rules of Law Which Apply Specifically to Actions by a Shipper Against a Carrier for Damage to Goods.

The present action is one brought by a shipper against a common carrier by railroad for damage to a shipment of goods moving in interstate commerce. In the circumstances Interstate Commerce Act §20(11), 49 U. S. C. A. §20(11), is applicable. That section provides in part as follows:

> "Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one state—to a point in another State—shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line such property may pass —and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed—"

Section 20(11) codifies the common law rule making a carrier liable without proof of negligence for all damage to goods transported by it, unless it affirmatively shows that the damage was occasioned by an Act of God, the public enemy, public authority, the shipper or the inherent vice or nature of the commodity.

> *Secretary of Agriculture v. United States,* 350 U. S. 162, 165, 100 L. Ed. 173, 76 S. Ct. 244 (1956);

Chesapeake & Ohio Railway Co. v. Thompson Manufacturing Co., 270 U. S. 416, 70 L. Ed. 659, 46 S. Ct. 318 (1926);

Schnell v. The Steamship Vallescura, 293 U. S. 296, 79 L. Ed. 373, 55 S. Ct. 194 (1934);

The Daido Line v. Thomas P. Gonzales Corp., 299 F. 2d 669 (C. A. 9, 1962).

Since the rule applies to the liability of a common carrier for loss to goods *in transit* the shipper must necessarily establish that at the time of the tender of the shipment to the carrier it was in good order and that it was in bad order when it arrived at destination.

The Daido Line v. Thomas P. Gonzales Corp., 299 F. 2d 699 (C. A. 9, 1962).

After tender in good order is established liability of the carrier follows without proof of negligence unless the carrier can establish that the actual cause of the injury while in its possession was attributable to one of the excepted causes stated above.

Secretary of Agriculture v. United States, 350 U. S. 162, 100 L. Ed. 173, 76 S. Ct. 244 (1956);

The Daido Line v. Thomas P. Gonzales Corp., 299 F. 2d 669 (C. A. 9, 1962);

Thompson v. James G. McCarrick Co., 205 F. 2d 897 (C. A. 5, 1953).

The carrier continues to be liable as an insurer for a damage in transit in cases where the actual cause of the loss is not explained.

See:

Commercial Molasses Corp. v. New York T. B. Corp., 314 U. S. 104, 109, 86 L. Ed. 89, 62 S. Ct. 156 (1941).

As was pointed out by the United States Supreme Court in the case last above cited, the special rules here stated apply because of the public duty which the common carrier assumes and the relative opportunity of the parties to know the facts and account for the loss.

Even in those situations in which the carrier can establish damage in transit to the shipper's goods are attributable to one of the excepted causes the duty rests upon the carrier to establish that it acted with due care in light of the special circumstances with which it was presented.

The Daido Line v. Thomas P. Gonzales Corp., 299 F. 2d 669 (1962);

Firpine Products Co. v. A. T. & S. F. Railway Co., 124 F. Supp. 906 (1954)

1.2 The Record Reflects That in Deciding This Case the District Court Did Not Apply the Applicable Law.

If an examination is made of the Findings of Fact and Conclusions of Law, the motion of the Appellant for correction of findings, and the ruling of the District Court with respect thereto, it is apparent that the District Court did not consider and apply applicable law to its determination of this case.

In Paragraph II of the Conclusions of Law, the District Court states as follows:

> "Plaintiff has not been damaged in any sum or at all by reason of any act, fault, carelessness, or omission or omissions in the transportation of said shipment by defendant and its connecting carriers, and hence defendant is entitled to judgment that plaintiff take nothing by its complaint—" [R. A. 44].

In Paragraph VIII of its Findings of Fact the District Court stated:

> "Defendant and its connecting carriers exercised ordinary care and afforded to said shipment in the transportation thereof, adequate and reasonable refrigeration protective service of the kind and extent requested by the plaintiff." [R. A. 43-44].

In Paragraph X of the findings the District Court stated:

> "Plaintiff failed to sustain the burden of proving that either defendant, or its connecting carriers, were in any way negligent in the transportation of said shipment." [R. A. 44].

Whether or not the shipment was in good condition when tendered to the carrier was one of the issues in the case. The District Court made no finding on this subject. Another major fact question essential to a determination of the controversy was the actual cause of the damage to the appellant's goods, if known, and if not, the finding that such cause remained unknown. On this subject the findings of the District Court are also silent. As the record reflects, Appellant by a motion under Rule 52(b) of the Rules of Civil Procedure specifically requested that the District Court make findings on these basic issues on the controversy [R. A. 47]. This motion was denied [R. A. 108].

The language which the District Court used in the Findings of Fact and Conclusions of Law quoted above is language consistent with the concept that the carrier duty is simply one of due care to all shippers and that the shipper must in any event prove some specific negligent conduct of the carrier as the actual cause of the loss or fail in its action.

1.3 The Errors Resulting From the Failure of the District Court Correctly to Interpret and Apply the Applicable Law Make It Necessary That Its Judgment Be Reversed.

An action by a shipper against a carrier for damage to goods is unusual in that the nature of the duty between the parties depends upon the circumstances under which the loss which is the subject of the action occured. Under applicable law the duty of the carrier to a particular shipper cannot be ascertained unless and until certain other questions are first decided in a proper and orderly sequence.

> *The Daido Line v. Thomas P. Gonzales Corp.*, 299 F. 2d 669 (1962).

Under the established rules of law the District Court had no right to consider the question of due care of the Appellee unless and until it first decided that the loss occurred while the goods were in transit and that such loss was attributable to an Act of God, the public enemy, public authority, the shipper, or an inherent vice or defect in the goods. Evidence as to the time of loss and its cause is discussed in some detail elsewhere in the argument. It is the position of Appellant, as elsewhere stated, that on a consideration of the entire record the evidence establishes that the shipment was in good order when tendered to Appellee but does not establish that the injury to the goods in transit was caused by any one of the above stated "excepted causes." Premises considered, the failure of the District Court to recognize that under the applicable law the defendant was liable without proof of fault and that defendant's negligence was not in fact a question in issue was obviously prejudicial error.

2. The Findings of Fact, Conclusions of Law and Judgment of the District Court Are Clearly Erroneous Because They Are Based Upon an Incorrect Interpretation of the Law as to the Burden of Proof in the Action.

Summary of the Argument.

The District Court imposed upon the Appellant, a shipper, the burden of proving the cause of damage to the shipment while in the possession of Appellee, a common carrier. Under the established law, upon proof by Appellant that the damage occurred while the shipment was in transit the burden of proof of the cause of the injury shifted to the Appellee. It was the duty of Appellee to prove, if it could, that the cause of the damage while the shipment was in transit was an Act of God, the public enemy, public authority, the shipper or an inherent vice or defect in the goods. If Appellee failed to explain the cause of the damage, Appellant was entitled to judgment without proof of fault. Thus, the District Court imposed upon Appellant a burden of proof which it was not obligated to assume under applicable law.

2.1 The Rules as to the Burden of Proof in an Action by a Shipper Against a Carrier for Damage to Goods Are Clearly Established.

The shipper has the burden of proving that the shipment was in good order when it was tendered to the carrier and in bad order upon arrival at its destination.

The Daido Line v. Thomas P. Gonzales Corp., 299 F. 2d 669 (1962);

Thompson v. James G. McCarrick Co., 205 F. 2d 897 (C. A. 9, 1953);

Chesapeake & Ohio Railway Co. v. Thompson Manufacturing Company, 270 U. S. 416, 70 L. Ed. 659, 46 S. Ct. 318 (1926).

Customarily this burden is met when the shipper presents in evidence a "clear" bill of lading.

The Daido Line v. Thomas P. Gonzales Corp., 299 F. 2d 669 (1962).

When, as is here the case, the shipment moves on "shipper's load and count" the plaintiff must go beyond the presumptions of the "clear" bill and establish that the shipment was in fact in good order when received by the carrier.

See:

Armour Research Foundation v. Chicago R. I. & P. R. Co., 297 F. 2d 176 (C. A. 7, 1961).

Once the shipper has established the shipment was received in good order and delivered in bad order by the carrier, the burden shifts to the carrier, if it is to avoid liability as an insurer, to establish that the actual cause of the injury while the goods were in transit was an Act of God, the public enemy, public authority, the shipper, or an inherent vice or defect in the goods itself.

Secretary of Agriculture v. United States, 350 U. S. 162, 165, 100 L. Ed. 173, 76 S. Ct. 244 (1956);

The Daido Line v. Thomas P. Gonzales Corp., 299 F. 2d 699 (C. A. 9, 1962).

Only when the carrier succeeds in establishing that the injury is from an excepted cause does the burden again shift to the shipper to establish that, but for the carrier's negligence in failing to guard against the

damage from such excepted cause, the injury which is the basis of the action would not have taken place.

Schnell v. The Steamship Vallescura, 293 U. S. 296, 79 L. Ed. 373, 55 S. Ct. 194 (1934).

See:

Delphi Frosted Foods v. Illinois Central Railroad Co., 188 F. 2d 343 (C. A. 6, 1951).

2.2 It Is Clear the District Court Acted on the Basis of a Misconception of the Law as to the Burden of Proof.

In its Findings of Fact the District Court stated specifically that it considered the burden was upon the Appellant to prove, as a condition of the right to recover in the action, that the Appellee, or its connecting carriers, were negligent [Finding of Fact X, [R. A. 44]]. This burden of proof which the District Court has charged to the Appellant in the finding above noted is one which the Appellant was not obligated to assume unless and until the Court could find and did find that the Appellee had established by a preponderance of the evidence the actual cause of the injury to the goods while in its possession was one of the "excepted" causes. Nowhere in its finding does the District Court give any indication that it was concerning itself with whether or not the Appellee had met its precedent burden of proof. Rather, the language of the findings strongly suggests that the District Court was laboring under the impression that it was dealing with an ordinary case of a negligent injury to property in that the burden of proof rested at all times with the Appellant as the plaintiff in the action. This conclusion is verified by comments which the District

Court made orally at the time of its decision which are reproduced in Points and Authorities In Support Of The Motion for New Trial [R. A. 52].

2.3 The District Court's Misconception of the Applicable Law as to Burden of Proof in the Case Has Clearly Resulted in Prejudicial Error.

Nowhere in its findings does the District Court decide what was in fact the cause of the injury to the Appellant's goods while in the possession of the Appellee. The finding of the District Court that judgment must be in favor of the Appellee because Appellant failed to meet what the District Court conceived to be the Appellant's burden of proving the cause of loss, strongly suggests that it was the view of the District Court that the exact cause of the injury remained unexplained to the end of the case. The rule of substantive law is clearly established that unless the carrier can prove affirmatively that the actual cause of the injury was an Act of God, the public enemy, the public authority, the shipper, or some inherent vice or defect in the goods, the carrier continues to be liable for the loss as an insurer.

Schnell v. The Steamship Vallescura, 293 U. S. 296, 79 L. Ed. 373, 55 S. Ct. 194 (1934).

Thus, on the basis of the evidence before it and a proper interpretation of the burden of proof as to the cause of injury, Appellant was entitled to a judgment. The District Court's improper view of the matter of burden of proof as to the cause of injury was clearly prejudicial.

3. The Findings of Fact of the District Court Are Clearly Erroneous Because They Do Not Include Findings on All Pertinent Issues and as a Result Are so Indefinite That No Clear Understanding of the Basis of Decision Sufficient to Permit an Intelligent Review Is Possible.

Summary of the Argument.

The District Court must find on all pertinent issues. Additionally, its findings must be adequate to inform the Court of Appeals of the basis of decision. No findings were made by the District Court either as to the condition of the shipment at time of delivery to the Appellee or as to the cause of the damage suffered. The condition of the goods at the time of tender to the carrier and the cause of damage are facts which are basic in any action by a shipper against a carrier for damage. The finding as to condition is essential to establish the time and place of the injury. The finding as to cause is essential to fix the character of the carrier duty and to resolve issues as to burden of proof. Until such findings are made the respective rights and duties cannot possibly be determined.

3.1 The Rule Is Clearly Established That Findings of Fact Must Be Clear and Complete.

The District Court was obligated to make findings of fact on all pertinent issues.

Fed. Rules Civ. Proc. §52(a);

Dale Benz, Inc. v. American Casualty Co., 303 F. 2d 80 (C. A. 9, 1962).

The findings of fact must also be sufficiently detailed to permit a clear understanding of the basis of deci-

sion so that there may be a proper review by the Court of Appeals.

National Lead Co. v. Western Lead Products Co., 291 F. 2d 447, 451 (C. A. 9, 1961);

Irish v. United States, 225 F. 2d 3 (C. A. 9, 1955).

3.2 The District Court Failed to Make a Finding of Fact as to the Condition of the Shipment at the Time of Its Tender to the Appellee.

Findings of fact as to the condition of the goods at the time of tender to the carrier and surrender at destination are basic in an action by a shipper against a common carrier to recover for damage to goods. The findings are essential because they establish the fact of damage and whether or not it took place while the shipment was in transit.

The District Court made a finding that the shipment was damaged upon arrival at destination [R. A. 43]. Under the pleadings the condition of the goods at the time of its tender to the Appellee was placed in issue [R. A. 3, 8]. However, the District Court made no formal finding as to whether or not it considered that the shipment was in good order at the time of tender to the Appellee. Unless and until the issue as to the condition of the goods at the time of tender to the Appellee is settled by an appropriate finding the validity of invalidity of the judgment cannot be tested. Obviously, if it were found as a fact upon sufficient evidence that the shipment was not in good order when tendered

to Appellee a judgment in favor of the Appellee would be proper but for reasons other than those relied upon by the District Court. On the other hand, if the District Court intended, as certain of its findings seem to infer, that shipment was in good order when tendered and that the injury took place subsequently, Appellant should recover in the action unless certain other findings could be made on substantial evidence that the cause of loss while in the possession of Appellee was one which would relieve Appellee from its obligation as an insurer of the safe delivery of the merchandise. Absent a specific finding on the important question of the condition of the goods at the time of its tender to the carrier the basis of decision of the District Court must necessarily remain a matter of speculation.

3.3 The District Court Has Failed to Make Essential Findings on the Question of the Cause of the Injury.

No determination of the action under applicable law is possible in the absence of appropriate findings with respect to the cause of the injury to Appellant's goods.

The District Court has made no findings whatsoever on this crucial issue. In previous portions of the argument attention of this Court has been directed to the substantive law which imposes upon the defendant liability of an insurer if the actual cause of the injury remains unexplained to the end of the case. Also, before the negligent character of the conduct of the Appellee could become a material circumstance a finding would first be required that the cause of the injury

was in fact an Act of God, the public enemy, the public authority, a shipper or an inherent vice or defect in the goods. Thus, not only the burden of proof but the substantive rights of the parties depend upon what findings the District Court might make on the question of the actual cause of the loss. If the District Court were to find that it could not decide from the evidence before it what was in fact the cause of the damage or that the cause of loss was other than one of the "excepted" causes a judgment in favor of the Appellant would have been required. If the District Court intended to suggest that the cause of injury was an "excepted" cause the sufficiency of the proof to support such finding would be a major issue on review. Unless and until the District Court makes known by an explicit finding its views as to the cause of the injury it is impossible for the Court of Appeals to determine with any degree of accuracy what was the basis of decision and to what extent, if at all, the District Court has followed applicable rules of law to burden of proof. When, as here, the evidence on the matters as to which findings are required is uncontradicted the Court of Appeals may determine the issues involved.

Dale Benz, Inc. v. American Casualty Co., 303 F. 2d 80 (C. A. 9, 1962);

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F. 2d 541, 548 (C. A. 9, 1949);

Yanish v. Barker, 232 F. 2d 939, 947 (C. A. 9, 1956).

4. The Finding of Fact of the District Court That the Sandwiches Tendered to Appellee for Transportation Were in Fact of a "Perishable" Nature Is Clearly Erroneous Because Such Finding Is Contrary to Uncontradicted Evidence.

Summary of the Argument.

The evidence is uncontradicted that a frozen sandwich, unlike a fresh food product, is inert and incapable of generating within itself any heat capable of causing damage to the product; that under the type of mechanical refrigeration which Appellee agreed to provide frozen sandwiches would remain in good condition for many months; that product deterioration within the transit time involved could result only by reason of exposure of the product to heat from some outside source. Therefore, the product involved was not "perishable" in the sense that it possessed an "inherent vice or defect". Accordingly, the finding of the District Court that the sandwiches were of a "perishable" nature is contrary to the uncontradicted evidence. The finding is prejudicial because, no inherent vice or defect being shown, Appellee was liable as an insurer for the loss of the goods.

4.1 The Challenged Finding Must Be Considered in Relation to the Issues of the Case and the Applicable Law.

The shipment which is the subject of the present action consisted of a carload of "frozen sandwiches". Appellant is aware that on first impression it would seem that a contention that frozen sandwiches are not a "perishable" flies in the face of physical facts.

However, an article may be "perishable" either because of its unusual susceptibility to destruction induced by an external force or because of its susceptibility to deterioration as a result of some inherent characteristic of the article itself. It is only in this latter sense that the term "perishable" has significance in the present litigation.

A carrier is liable without proof of fault for damage induced by external force however slight or unavoidable. It is only when the loss can be attributed to an inherent vice or nature of the commodity such as loss from decay, fermentation, evaporation or natural shrinkage that the liability of due care is substituted for that of an insurer.

> *Secretary of Agriculture v. United States,* 350 U. S. 162, 100 L. Ed. 173, 76 S. Ct. 244 (1956).

Therefore, the finding of the District Court that the sandwiches were in fact of a "perishable" nature has no significance in the present controversy except as it is intended as a determination that the product shipped, *i.e.,* a *frozen* sandwich, was subject to deterioration while in transit because of some inherent vice and without being subjected to any external force. The evidence will not support a finding that frozen sandwiches transported under mechanical refrigeration are "perishable" in the sense that they are the subject of any inherent vice or defect.

4.2 The Evidence Is Uncontradicted That Frozen Sandwiches Have No Inherent Vice or Defect Which Can Cause Damage in Transit.

Both the Appellant and the Appellee produced testimony through expert witnesses as to physical characteristics of sandwiches in the frozen state, particularly with respect to the possibility of self-destruction or deterioration thereof. There was no contradiction in the testimony of these witnesses as to the physical facts. Both of the expert witnesses testified that a frozen commodity, being below its freezing point and at a low temperature, is an inert quantity with respect to any heat generation [Tr. 399, 208]. Held below their freezing point sandwiches would keep without deterioration for periods of several months and possibly for a year or more [Tr. 209]. As Appellee's expert pointed out, there is a difference between what he described as "fresh perishables" and what he characterized as "frozen commodities" [Tr. 399]. Fresh perishables have a "heat of respiration" and generate heat from within [Tr. 399]. The heat generated by a fresh perishable may be as much as several times the amount of heat which would leak through the walls of the storage structure [Tr. 400]. On the other hand, a frozen commodity, since it has no heat generating capability within itself, can be maintained in its frozen condition merely by intercepting heat which would be admitted through the wall or car structure [Tr. 399].

The expert who testified on behalf of the Appellee was the refrigeration engineer responsible for the design and construction of the refrigerator car which was used to transport the shipment in question [Tr. 377]. This witness testified that the refrigerator car

furnished, when operating properly, had sufficient capacity not only to hold a frozen shipment in frozen condition, but also to exert a cooling force if the refrigeration system was set to hold inside temperature at zero degrees Fahrenheit and the car operated through outside temperature conditions averaging 100° Fahrenheit [Tr. 441-445]. The refrigeration engineer who testified for the Appellant confirmed this evaluation of the car's capabilities when operating properly [Tr. 521-523].

It was stipulated between the parties that the Appellee and its connecting carriers agreed to provide mechanical protective service adequate to hold frozen sandwiches in a frozen condition during the course of transit [R. A. 30-31, 34].

On the foregoing facts, the conclusion is inescapable that the frozen sandwiches here involved were not a "perishable" in the sense that they were subject to an "inherent vice or defect" within the meaning of that term as it is used for purposes of fixing responsibility of Appellee as a common carrier. The environment which Appellee agreed to provide for the transportation of the shipment was one at a level below the freezing point of the product involved. The car in which the shipment moved was capable, when operating properly, to provide and maintain this environment. Within this environment the frozen sandwiches would maintain good quality and condition for a period far longer than that required for the transportation. Further, on Appellee's own evidence, it appears that the frozen sandwiches held below the freezing level had no power of self-destruction. All of the experts were agreed that the only way in which the frozen sandwiches could be

subject to injury would be by the exposure to heat from an outside source. Nowhere in the record is there any evidence to contradict the testimony of the expert witnesses called by both the Appellant and the Appellee as to these characteristics of the sandwiches when in frozen condition. In the circumstances the finding of the District Court that the sandwiches were of a "perishable" nature is directly contrary to the uncontradicted evidence.

4.3 The Erroneous Finding as to the "Perishable" Nature of the Product Involved Constituted Prejudicial Error.

Under the established law the Appellee was entitled to rely upon due care in the transportation of the shipment as a defense to an action for damages only in the event it could be established that the product was of such character that it would deteriorate in the course of transport because of its own inherent characteristics and that it had done so.

> *Secretary of Agriculture v. United States,* 350 U. S. 162, 100 L. Ed. 173, 76 S. Ct. 244 (1955).

Obviously since the product, on Appellee's own showing, was of such character that it did not have any inherent vice or defect and that its destruction in transit could come only from the operation of some outside force, the existence of the "excepted cause" which Appellee was required to establish in order to make available to it the limitations of liability upon which it relies as a defense could not possibly exist as a physical fact. Had the District Court found, as it was required to find under the uncontradicted evidence, that

frozen sandwiches are not a "perishable" product in the sense in which that term is used in fixing the rights and duties of the parties in a case of this kind, its ultimate conclusion that Appellant was obliged to prove some act of negligence as a condition precedent to recovery could not possibly stand. At no stage in this case has the Appellee ever urged seriously the existence of any one of the so-called "excepted causes" other than "inherent vice or defect of the goods". Since existence of inherent device or defect cannot be supported on the uncontradicted evidence the finding that the product shipped was "perishable" in nature was clearly erroneous.

5. **The Findings of the District Court That the Appellee Did Nothing to Cause Injury or Damage to the Shipment and That It Acted With Ordinary Care and in Compliance With the Conditions of the Bill of Lading and Applicable Tariffs Are Clearly Erroneous Because They Are Not Supported by Any Substantial Evidence.**

Summary of the Argument.

The findings of the District Court to the effect that Appellee complied with instructions and was not the cause of the damage are not supported by any substantial evidence. The evidence that the shipment was tendered to the Appellee frozen and otherwise in good condition is uncontradicted. The cargo was partially unfrozen upon arrival at destination. The physical facts are such that the damage could not have been caused from any heat generated by the cargo. Heat from outside the car was the only possible source of the damage. The car was so designed and constructed that heat could reach the load within the car only if

the mechanical refrigeration system failed to operate properly. The known physical facts establish that the injury must have been caused by a malfunction of one or more components of the mechanical refrigeration unit intended to assure continuous air movement within the car so that the temperature readings taken from a gauge located outside the car did not measure the true temperature of the air immediately surrounding the load.

5.1 Issues Here Raised Are Properly Within the Scope of Review by the Court of Appeals.

Appellant is aware of the basic rule that findings of the District Court on matters of fact will not be disturbed unless they are clearly erroneous and that it is not the function of the Court of Appeals to reconsider the evidence *de novo.*

> *Federal Rules of Procedure,* Rule 52(a);
> *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1947).

However, the Court of Appeals has the duty to determine if the findings as made by the District Court have support in the evidence.

> *Los Angeles Trust Deed and Mortgage Exchange v. S. E. C.,* 264 F. 2d 199 (1959).

If, upon consideration of the entire evidence, the Court of Appeals is left with a definite and firm conviction that a mistake has been made the decision of the District Court must be reversed even though there may be some evidence to support it.

> *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1947).

In the present case there is almost no conflict as to facts. There are even very few disagreements as to the inferences to be drawn from the facts. There were some differences in the evidence of the representative of the consignee and of the Appellee who examined the car after its arrival at Chicago as to the number and location of cartons found to be in unfrozen condition [Tr. 159-162, 334-337, Ex. 7]. However, the significance of this apparent and limited conflict is minimized by virtue of the fact that the observations were made on different days [Tr. 147, 327]. The only other area of disagreement involved certain conclusions which the expert witnesses drew as to the significance of the temperature record of the car while in transit [Tr. 415-416, 523-526].

The Findings of Fact (other than Finding X discussed in the next preceeding portion of the argument) which are challenged on the basis that they are not supported by the evidence are Findings VII, VIII and IX. Specifically, these findings are as follows:

"VII.

Defendant and its connecting carriers have fully complied with all of the provisions of the bill of lading and of all applicable protective tarriff rules and regulations in the transportation of said shipment.

VIII.

Defendant and its connecting carriers exercised ordinary care and afforded to said shipment in the transportation thereof, adequate and reasonable refrigerated protective service of the kind and extent requested by plaintiff.

IX.

Nothing done or admitted to be done on the part of defendant, or any of its connecting carriers, proximately caused any loss of or damage to said shipment."

These findings are so closely related that a discussion of the evidence in relation to each on a separate basis would result in duplication. Accordingly, discussion of the evidence will be confined to a single statement with reference to the specific findings in the course of the argument as seems pertinent.

5.2 The Evidence Is Clear That the Cause of Damage Is One for Which the Appellee Is Legally Responsible.

The evidence is conclusive that the shipment was frozen and otherwise in good condition when tendered for shipment.

Appellant produced as witnesses, either by direct testimony or through stipulation, all of the persons who had participated in the handling and loading of the shipment involved. The evidence shows that prior to time the shipment moved Appellant had transported frozen sandwiches over a wide area for a number of years without loss or damage [Tr. 9]. Within a six months' period immediately prior to the time that this shipment moved some eight to ten rail car shipments had been made with no spoilage problems whatsoever [Tr. 9, 90]. The same practices with respect to production, freezing and loading were followed on the shipment here involved as had been followed in the prior cases [Tr. 90, 29-41, 135-136, 229-234, 239].

Statements of the witnesses as to these manufacturing, freezing, and loading practices may be summarized as follows:

The sandwiches were prepared, packaged and cartoned on an "assembly-line" from ingredients supplied daily by nationally known purveyors [Tr. 13-17]. Where necessary, these ingredients are held under temperature control [Tr. 13-17]. The sandwiches in cartons were then frozen in a freezer on the premises capable of reducing sandwich temperature to 6° Fahrenheit within a period of twelve hours [Tr. 21, 113]. The freezer was normally set at a temperature from zero to minus 20 degrees. The termperature readings were taken several times a day [Tr. 105]. Merchandise was stacked in the freezer so as to permit air circulation [Tr. 18, 99, 104]. Merchandise in the freezer was marked by date of entry in identification and held in the freezer box a minimum of 24 hours [Tr. 25, 107, 239].

In the opinion of a recognized authority on the processing of food products, Appellee followed standard industry practices in the processing, freezing and handling of its products [Tr. 204-205].

The sandwiches which had been longest in the freezer were first loaded [Tr. 25, 232]. The product was moved from the freezer to the rail car, a distance of approximately one mile, in van trucks [Tr. 28, 33, 230]. It was the practice to take temperatures of product during the loading process to verify frozen condition at the time of removal from the freezer [Tr. 109, 235]. Rail car doors were kept closed and locked except when loading was in progress [Tr. 72]. Load-

ing from truck to rail car was accomplished with conveyers with two or three workmen participating [Tr. 34, 112].

The expert witness produced by Appellee gave evidence that the cartons taken from the refrigerator and moved by truck would be expected to absorb heat and that he had observed frozen food shippers who insisted on a shroud or canopy or some other device to minimize the effect of sunshine on the commodity while it was being loaded [Tr. 404, 407]. This witness, however, expressed no opinion that the procedures followed by Appellant would produce effects harmful to the product [Tr. 404-407].

The refrigeration engineer who testified on behalf of the Appellant made investigations predicated upon the evidence given in this case as to the conditions of loading and unloading which actually prevailed. It was his testimony that exposed packages on the outside layer of cartons within the truck would change in temperature about two or three degrees and that the temperature change on cartons at the interior of the truck would not be a measurable amount [Tr. 518].

The evidence shows without contradiction that frozen sandwiches in cartons can be distinguished from those which are not frozen by the sense of touch, visible frost on the cartons, and the fact that frozen sandwiches are hard and will rattle within the containers as they are moved [Tr. 40-41, 232]. All of those who participated in the loading of the car testified the procedures followed on the loading of the car in question were the same as those which were used in the loading of all other cars [Tr. 75, 135, 239, 229]. This testimony is valid and

sufficient to support a finding of the good condition of the merchandise at the time of loading.

United States v. Apex Fish Co., 177 F. 2d 364 (C. A. 9, 1949).

There was, however, additional evidence on this issue. Witnesses who participated in the loading of the car in question all gave evidence that they never at any time loaded sandwiches into this or any other rail car which were not cold to the touch and apparently frozen from all indications which handling and observations would detect [Tr. 40-41, 232, 241-42, 247, 251]. At least one witness who had participated in the loading had specific recollection that the cartons which went into the car in question were cold to the touch [Tr. 232]. It was stipulated that the others who had participated in the actual loading of the car would give similar testimony if called [Tr. 248, 251]. Appellee presented no evidence bearing directly on the condition of the car at the time of loading. In the circumstances, Appellant established beyond the possibility of doubt that shipment was in good condition when it was tendered to the Appellee.

The evidence is uncontradicted that the damage was actually caused by some defect in the operation of the mechanical refrigeration equipment while the car was in transit.

The parties are in agreement, and the Court found, that at the time of unloading a portion of the shipment was defrosted and in damaged condition unacceptable to the consignee, who rejected the entire shipment [R. A. 25, 43]. Also, as has been noted in a prior argument, heat cannot be self-generated by froz-

en sandwiches [Tr. 399]. Heat necessary to produce thawing of the load could only come from some outside source. This source was heat leakage through the vehicle's structure [Tr. 399]. The capacity of the mechanical refrigeration unit was such that, properly operating, heat penetration to the load could not take place [Tr. 441-445]. All of the foregoing facts were established through Appellee's own evidence. From this testimony it is apparent that a frozen shipment could not possibly have been damaged in transit if the car was operating properly.

The refrigerator car used for the transportation was so designed that in proper operation a moving envelope of air completely surrounded the shipment [Tr. 385-388]. The freezing coils and a blower used to cool and move the air around the periphery of the load were located within the cargo compartment [Tr. 385-388, Ex. N]. The car was so designed that when the blower and other elements of the mechanical refrigeration unit were operating air moved continuously through the air spaces around the load and across the coils thus removing heat introduced into the car through the structure before it could reach the load [Tr. 393]. In the cooling process ice formed on the coils impeding the passage of air [Tr. 447-448]. The resulting reduction in air flow activated the defrost cycle [Tr. 447-48, 525-526]. From outside the car it was impossible to determine whether or not the blower was operating [Tr. 449]. Also, if the defrost mechanism did not function properly the restriction of air movement caused by continued operation of the freezer unit in the car could not be detected [Tr. 525-526].

The car in which the shipment moved was equipped with a thermometer located with its gauge on the outside of the car and its sensing element in the air passage within the storage compartment a short distance below the freezer coils [Tr. 393].

While the car involved in the within action was in transit from Culver City to Chicago and return, certain inspections were made by carrier employees and the results included in written inspection reports. The substance of these reports as they pertain to the temperature readings of the thermometer above described are reflected in Exhibit A. The temperature reading as reflected by this report, in the order in which they were taken while the car was en route to Chicago, were +7°, +5°, +6° and +2° [Ex. A]. During the period the car was in Chicago inspection report termperatures ranged from +6°, and +8°. The temperatures reported on the return trip, again in the order in which they were taken were +4°, —1°, 0°, +2°, and +1° [Ex. A]. Appellee's refrigeration expert testified that the temperature record on the return trip was consistent with that which he would expect to find with a frozen load and the car operating properly at a setting of —5°F. [Tr. 454]. This witness also gave evidence that he considered from the information in the inspection reports that the refrigeration equipment was operating in satisfactory condition on the eastbound trip [Tr. 415]. This opinion was, however, apparently based upon the premise that so long as the thermometer read below plus 10 degrees the car was operating at a proper level [Tr. 469]. Appellee's expert conceded that the temperature pattern on the eastbound trip gave some indication that the interior temperatures were not what

they would be expected to be in a car operating normally with a frozen load [Tr. 459-462].

The refrigeration engineer called by Appellant made an analysis of all of the evidence produced at the trial and an examination of the car. He also ran studies and tests to determine the effect of different temperature loads on temperature readings assuming an operating and functioning mechanical unit [Tr. 522-524].

It was the testimony of this witness that, if the car were operating properly at a thermometer setting of —5°F. and merchandise loaded at +15° at origin, temperature readings would be expected to drop and to be at approximately the zero level upon arrival [Tr. 523]. However, if air flow in the car was restricted and the air in the car did not move while the car was subjected to an average outside air temperature of 80°, one-fourth to one-third of the load would have been thawed upon arrival, with temperature ranges on the top layers of the load from +48° to +60° [Tr. 524]. As noted above, because of the location of the thermometer sensing unit immediately below the freezing coils, the temperature readings below freezing would be expected even though the load itself was warm because frost would continue to develop on the freezing coils and because, without air circulation the cold air from the ice would flow down onto the sensing unit of the thermometer [Tr. 525-526]. In the opinion of this witness the only explanation of the cause of damage consistent with all available facts is that there was a restriction in the air flow in the car caused by a malfunction of some component of the mechanical freezing unit within the load compartment and thus not subject to detection under

the check system of Appellee and its connecting lines [Tr. 525-528].

There is uncontradicted testimony that during the eastbound movement of the car there was damage to a fuel line which required repair [Ex. A]. The cause of this damage was never explained. Although the record shows the broken fuel line did not cause the specific injury which is the basis of this action, unexplained damage to the car is some indication that conditions varying from the normal must have been encountered [Tr. 395-396]. It is also significant that the record of temperatures maintained and fuel consumption in the same car with the same load was different on the eastbound movement than it was on the westbound movement. It is known the car was operating properly with a frozen load upon the return movement and that temperature readings taken on the return trip were consistent with the frozen condition of the cargo upon its return to Culver City [Ex. A].

The evidence is uncontradicted the shipment was frozen and otherwise in good order when placed in the car. Appellee's own evidence establishes that the product had no power of self-destruction. Appellee's evidence further proves that the only possible source of the injury sustained was the introduction of heat into the car from an outside source. In a properly operating car it would be an impossibility for heat to reach the load under the termperature conditions encountered en route because of its design and the capabilities of the mechanical refrigerating unit. On the eastbound trip the temperature and other performance records are such as to indicate abnormal conditions. The evidence shows that the only explanation of what took

place consistent with all of the fact circumstances is that there was a restriction or block of air flow within the car which permitted heat to be introduced through the car's structure into the load. The evidence further shows that if air circulation was stopped, by malfunction of the blower, the defrost unit or otherwise the temperature readings to be expected would be those which were encountered even though under such conditions the load itself would be wholly or partially thawed.

When all of the evidence is considered it is obvious that the injury to the goods was not caused by any one of the "excepted causes". There is strong indication that the actual cause of the injury was in fact a malfunction of the mechanical refrigeration system within the storage compartment of the car which prevented the flow of air while the vehicle was in transit. The most that can be said of the evidence in favor of Appellee is that the cause of the loss remains in doubt. Under each and every one of these alternatives the findings which the District Court has made which are here challenged are entirely contrary to the burden and weight of the evidence and for that reason improper and erroneous.

6. Conclusion.

The District Court has committed prejudicial error because it has failed to consider and apply applicable law with respect to the rights and duties of the parties and the burden of proof which each must bear in the case. No findings have been made either as to the conditions of the goods at the time of its delivery or as to the cause of the injury in transit. These findings

are essential to a determination of the case. In the absence of findings on these issues, it is impossible to determine with certainty what was in fact the actual basis of decision in the lower court. In other respects the findings which have been made are contrary to the clear weight of the evidence. The findings of fact, conclusions of law and judgment of the District Court are clearly erroneous and the judgment should be reversed.

Respectfully submitted,

THEODORE W. RUSSELL,
Attorney for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

THEODORE W. RUSSELL